

In the Matter of Merchant Mariner's Document No. Z-41838 and all other Licenses and Documents

Issued to: HARRY TAYLOR

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

964

HARRY TAYLOR

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

An Examiner of the United States Coast Guard conducted a hearing at San Francisco, California, and, by order dated 27 July 1956, suspended Merchant Mariner's Document No. Z-41838 issued to Harry Taylor upon finding him guilty of misconduct. Two specification alleged in substance that while serving as a messman on board the American SS MORMACLAND under authority of the document above described, on or about 3 March 1956, while said vessel was in the port of Santos, Brazil, Appellant wrongfully created a disturbance while under the influence of alcohol by fighting with another crew member, utilityman Gregorio Gutierrez (First Specification); Appellant assaulted and battered Gregorio Gutierrez "by hitting him with your fists" (Second Specification).

After considering the testimony of several witnesses for each party, the Examiner concluded that the charge had been proved by proof of the First Specification and by proof of the Second Specification except for the words "by hitting him with your fists." The Examiner then entered the order suspending Appellant's Merchant Mariner's document No. Z-41838, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of three months on twelve months' probation.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 3 March 1956, Appellant was serving as a messman on board the American SS MORMACLAND and acting under authority of his Merchant Mariner's Document No. Z-41838 while the ship was in the port of Santos, Brazil.

At approximately 1745 on 3 March 1956, Appellant and utilityman Gutierrez were in the crew pantry cleaning up after the evening meal and arguing about the division of their work. Appellant had complained previously to the union delegate that Gutierrez did not perform his duties properly. At this time, Gutierrez turned to leave the pantry while Appellant was claiming that Gutierrez had not finished cleaning the pantry. Appellant then attempted to strike Gutierrez with his fist but missed. The two seamen grappled with each other until they were separated when the Chief Cook pulled Appellant away from Gutierrez. Appellant was under the influence of alcohol to some extent although he was not staggering.

Appellant resisted the efforts of the Chief Cook who was then required to use force to get Appellant into his room. Gutierrez left the scene of the fight voluntarily without any attempt to continue the fight or argument. Gutierrez was not injured during the scuffle with Appellant. Later, Appellant left his room and started a fight with the Chief Cook.

Appellant's prior record during 15 years at sea consists of an admonition received in 1943 for failing to turn to.

#### BASIS OF APPEAL

This appeal has been taken from the other imposed by the Examiner. Appellant contends that the conclusions of the Examiner must be reversed unless the specific allegation contained in the words "by hitting him with your fists," which limits the general allegation of assault and battery, is supported by the evidence; and such is not the case.

Gutierrez was the aggressor and his motive for striking Appellant was that he had told the union delegate that Gutierrez did not perform his duties. A persona attacked by another is entitled to stand his ground and defend himself rather than being bound to retreat. The record shows that Gutierrez was at least equally at fault with Appellant for the fight.

In conclusion, it is respectfully submitted that the specifications were not proved and the charge of misconduct should be dismissed.

APPEARANCE: J. J. Doyle, Esquire, of San Francisco, California,  
of Counsel.

#### OPINION

Although there is conflicting testimony in the record, there

is substantial evidence to support the conclusion that Appellant initiated the disturbance which followed after he attempted to strike Gutierrez. Together with the bodily contact which resulted as the two seamen grappled, this constituted the assault and battery upon Gutierrez. Appellant's belligerent and aggressive attitude is indicated by his reluctance to stop fighting when the Chief Cook separated them as by the fact that he started a fight with the Chief Cook a short time afterward. Regardless of the possible motive on the part of Gutierrez, the Examiner who saw and heard the witnesses testify accepted the version that Appellant started the scuffle. This conclusion is supported by Appellant's generally belligerent attitude throughout the time in question.

Proof of the allegation, "by hitting his with your fist," is not essential to proof of the general allegation of assault and battery. The record shows that Appellant tried to hit Gutierrez several times but was unable to do so because Gutierrez moved too fast. It is provided by regulation (46 CFR 137.09-65) that a specification may be found "proved in part." That is the conclusion reached by the Examiner with respect to the Second Specification in this case.

#### ORDER

The order of the Examiner dated at San Francisco, California,  
on 27 July 1956, is AFFIRMED

J. A. Hirshfield  
Rear Admiral, United States Coast Guard  
Acting Commandant

Dated at Washington, D. C., this 22nd day of May, 1957.